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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re:

Amendment of the Commission's
Rules Regarding a Plan for Sharing the
Costs of Microwave Relocation

RM - 8643

To: The Commission

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STATEMENT ON PETITION FOR RULE MAKING

The law firm of Duncan, Weinberg, Miller & Pembroke, P.C. herewith submits this Statement on the "Petition For Rulemaking Of Pacific Bell Mobile Services" ("Petition"). In support, the following is shown:

1. Duncan, Weinberg, Miller & Pembroke, P.C. represents and advises municipalities across the country, in the States of Alabama, California, Delaware, Florida, Indiana, Maryland, Massachusetts, New York, Ohio, Texas, and Washington, among others. Local jurisdictions in these and other states are excited about the prospects and opportunities offered by PCS and by other emerging technologies. Municipalities anticipate numerous, yet unforeseen, opportunities for residents, for local businesses, and for the delivery of municipal services, even though these jurisdictions may have to relocate their radio services to accommodate PCS.

2. Pacific Bell Mobile Services ("PBMS") raises a valid concern, from the perspective of PCS operators -- no PCS operator should get a "free ride", and gain a competitive advantage, when it comes to the cost of relocating existing microwave radio services.

3. The FCC has already established the process for relocating incumbent radio services, to accommodate PCS operations in the 1850-1990 MHz band.

4. The process differs, depending upon whether or not incumbents hold "public safety" authorizations -- facilities directly used for police, fire or emergency medical services operations involving safety of life and property. The relocation plan for public safety licenses includes a three (3) year period for voluntary negotiations, followed by a two (2) year period for mandatory negotiations.

5. For non-public safety licenses, the process differs for frequencies used by licensed PCS services and by unlicensed PCS devices:

(a) For licensed services, a two (2) year period for voluntary negotiations precedes a one (1) year period for mandatory negotiations.

(b) For unlicensed devices, there is a single one (1) year mandatory negotiation period.

6. Should voluntary and mandatory negotiations fail, then the PCS provider can request involuntary relocation of the existing facility, provided:

(a) The PCS provider must guarantee payment of all relocation costs, including engineering, equipment, and site costs; FCC fees, and reasonable additional costs;

(b) The PCS provider must complete all activities to place the new facilities into operation, and

(c) The PCS provider must build and test the new facilities for full comparability to the existing system, before the incumbent must relocate. If, within one year after the new facilities commence operation, the incumbent demonstrates that they are not comparable to the former facilities, then the PCS provider must remedy any deficiencies or pay to relocate the microwave licensee back to the former facilities.

7. The FCC has said that comparable facilities must be "equal to or superior to existing facilities", considering system reliability, capability, speed, bandwidth, throughput, overall

efficiency, bands authorized for such services, and interference protection.

8. The voluntary negotiation period for the A and B Block PCS frequencies has already begun. By Public Notice released April 19, 1995, DA 95-872, the Commission announced that:

the two-year voluntary negotiation period for 2 GHz microwave incumbents operating in the broadband PCS "A" and "B" blocks shall be deemed to have commenced on April 5, 1995, the date that the A and B block auction winners filed their long form applications. Accordingly, the voluntary negotiation period for non-public safety microwave licensees in these blocks expires on April 5, 1997. For public safety microwave licensees operating in the A and B blocks, the three-year voluntary negotiation period begins on April 5, 1995, and expires on April 5, 1998. Negotiation periods for additional PCS blocks shall be announced by future public notice.

9. By Public Notice released May 11, 1995, the Commission announced that the auctions for the PCS "C" block frequencies will commence on August 2, 1995.¹

¹ By Public Notice released June 13, 1995, the Commission temporarily suspended the filing date for applications for the "C" block frequencies, "in light of the Supreme Court's decision . . . in *Adarand Constructors, Inc. v. Pena*, Secretary of Transportation. . . to give both the Commission and potential applicants time to analyze the Supreme Court's decision." However, the Commission also stated that it "anticipates that a new filing deadline for the short-form applications will be announced shortly and that the auction will commence on August 2nd." It remains to be seen whether, in fact, the Commission can and will go forward with "C" block auctions as currently structured.

In a speech delivered June 5, 1995, FCC Chairman Reed Hundt stated that the Commission "will complete PCS auctions by starting the Broadband PCS D, E and F block auctions in December [1995]."

10. Because the auctions for the PCS "A" and "B" blocks commenced December 5, 1994, and ended March 13, 1995, one could predict that the voluntary negotiation period for the "D", "E" and "F" blocks might commence in April, 1996. In any event, the FCC will stagger the negotiation periods for the different PCS frequency blocks, because of the timing of the auctions, and depending on the nature of the incumbent radio service and of the PCS operation.

11. Incumbent licensees frequently express the concern that the voluntary negotiations will falter and that they will be forced into mandatory negotiations. The PBMS Petition adds a new concern that the staggered voluntary negotiation periods would, for all practical purposes, be cut short by this proposed "cost sharing" process -- the voluntary negotiation timetable set for the "A" and "B" channel licensees would preclude or dictate negotiations with the "C" through "F" licensees.

12. PCS offers the potential for creative public-private partnerships, which can materialize as incumbents and PCS licensees negotiate face to face.

However, the interests of an "A" block licensee are not necessarily the same as those of the entrepreneurial "C" block licensee or of the 10 MHz licensees. We submit that the FCC should allow its process to work, before altering it.

13. We also question whether the role suggested by PBMS is an appropriate role for the FCC. The Commission's process already creates the possibility that the Commission will have to arbitrate such issues as who holds a "public safety" license; what constitutes "comparable facilities", and the "reasonableness" of costs. Should the Commission also take on the role of Equity Referee, to make sure that no PCS operator is unjustly enriched? Certainly not, if it compromises the interests of incumbent licensees.

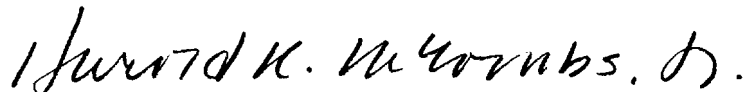
14. Finally, we are troubled by the attempt of PBMS to establish a \$600,000/link limit on reimbursement. While that specific number might seem generous in the abstract, neither the Commission nor the parties know at this point what the cost will be. Why should there be any pre-determined limit? Furthermore, the Commission has already rejected such a concept in creating the relocation process. ²

² Redevelopment Of Spectrum To Encourage Innovation In The Use Of New Telecommunications Technologies, 7 FCC Rcd. 6886, 6890, 71 RR2d 349, 355 (1992).

15. In closing, the question we ask is: How does PBMS's proposal help existing licensees, especially those in the public safety arena? It is not at all clear from the PBMS Petition.

WHEREFORE, Duncan, Weinberg, Miller & Pembroke, P.C. requests that the Commission deny the PBMS Petition, pursuant to Section 1.407 of the Rules and Regulations.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Harold K. McCombs, Jr. do hereby certify
that I have caused to be served by mail, First Class
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the foregoing "Statement On Petition For Rule Making"
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